



U.S. Citizenship
and Immigration
Services

(b)(6)

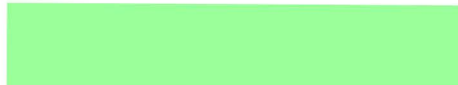


DATE: **JUL 14 2014**

Office: NEBRASKA SERVICE CENTER

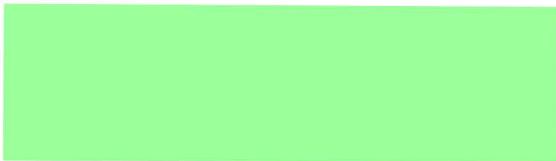
FILE: 

IN RE: Petitioner:
Beneficiary:



PETITION: Immigrant Petition for Alien Worker as an Alien of Extraordinary Ability Pursuant to Section 203(b)(1)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(1)(A)

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at <http://www.uscis.gov/forms> for the latest information on fee, filing location, and other requirements.** See also 8 C.F.R. § 103.5. **Do not file a motion directly with the AAO.**

Thank you,

Ron Rosenberg
Chief, Administrative Appeals Office

NON-PRECEDENT DECISION

Page 2

DISCUSSION: The Director, Nebraska Service Center, denied the employment-based immigrant visa petition, which is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner seeks classification of the beneficiary as an “alien of extraordinary ability” in athletics, pursuant to section 203(b)(1)(A) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(1)(A). The director did “not find the beneficiary to be an individual of extraordinary ability.”

Congress set a very high benchmark for aliens of extraordinary ability by requiring through the statute that the petitioner demonstrate the alien’s “sustained national or international acclaim” and present “extensive documentation” of the alien’s achievements. *See* section 203(b)(1)(A)(i) of the Act and 8 C.F.R. § 204.5(h)(3). The implementing regulation at 8 C.F.R. § 204.5(h)(3) states that an alien can establish sustained national or international acclaim through evidence of a one-time achievement of a major, internationally recognized award. Absent the receipt of such an award, the regulation outlines ten categories of specific objective evidence. 8 C.F.R. § 204.5(h)(3)(i) through (x). The petitioner must submit qualifying evidence under at least three of the ten regulatory categories of evidence to establish the beneficiary’s basic eligibility requirements.

On appeal, the petitioner submits a brief and additional evidence. For the reasons discussed below, we uphold the director’s ultimate conclusion that the petitioner has not established the beneficiary’s eligibility for the exclusive classification sought.

I. LAW

Section 203(b) of the Act states, in pertinent part, that:

(1) Priority workers. -- Visas shall first be made available . . . to qualified immigrants who are aliens described in any of the following subparagraphs (A) through (C):

(A) Aliens with extraordinary ability. -- An alien is described in this subparagraph if --

(i) the alien has extraordinary ability in the sciences, arts, education, business, or athletics which has been demonstrated by sustained national or international acclaim and whose achievements have been recognized in the field through extensive documentation,

(ii) the alien seeks to enter the United States to continue work in the area of extraordinary ability, and

(iii) the alien’s entry into the United States will substantially benefit prospectively the United States.

U.S. Citizenship and Immigration Services (USCIS) and legacy Immigration and Naturalization Service (INS) have consistently recognized that Congress intended to set a very high standard for individuals seeking immigrant visas as aliens of extraordinary ability. *See* H.R. 723 101st Cong., 2d Sess. 59 (1990); 56 Fed. Reg. 60897, 60898-99 (Nov. 29, 1991). The term “extraordinary ability” refers only to those individuals in that small percentage who have risen to the very top of the field of endeavor. *Id.*; 8 C.F.R. § 204.5(h)(2).

The regulation at 8 C.F.R. § 204.5(h)(3) requires that the petitioner demonstrate the alien’s sustained acclaim and the recognition of his achievements in the field. Such acclaim must be established either through evidence of a one-time achievement (that is, a major, international recognized award) or through the submission of qualifying evidence under at least three of the ten categories of evidence listed at 8 C.F.R. § 204.5(h)(3)(i)-(x).

In 2010, the U.S. Court of Appeals for the Ninth Circuit (Ninth Circuit) reviewed the denial of a petition filed under this classification. *Kazarian v. USCIS*, 596 F.3d 1115 (9th Cir. 2010). Although the court upheld the AAO’s decision to deny the petition, the court took issue with the AAO’s evaluation of evidence submitted to meet a given evidentiary criterion.¹ With respect to the criteria at 8 C.F.R. § 204.5(h)(3)(iv) and (vi), the court concluded that while USCIS may have raised legitimate concerns about the significance of the evidence submitted to meet those two criteria, those concerns should have been raised in a subsequent “final merits determination.” *Id.* at 1121-22.

The court stated that the AAO’s evaluation rested on an improper understanding of the regulations. Instead of parsing the significance of evidence as part of the initial inquiry, the court stated that “the proper procedure is to count the types of evidence provided (which the AAO did),” and if the petitioner failed to submit sufficient evidence, “the proper conclusion is that the applicant has failed to satisfy the regulatory requirement of three types of evidence (as the AAO concluded).” *Id.* at 1122 (citing to 8 C.F.R. § 204.5(h)(3)).

Thus, *Kazarian* sets forth a two-part approach where the evidence is first counted and then considered in the context of a final merits determination. In this matter, we will review the evidence under the plain language requirements of each criterion claimed. As the petitioner did not submit qualifying evidence on behalf of the beneficiary under at least three criteria, the proper conclusion is that the petitioner has failed to satisfy the antecedent regulatory requirement of three types of evidence. *Id.*

II. ANALYSIS

A. Prior O-1

While USCIS has approved at least one O-1 nonimmigrant visa petition filed on behalf of the petitioner, the prior approval does not preclude USCIS from denying an immigrant visa petition

¹ Specifically, the court stated that the AAO had unilaterally imposed novel substantive or evidentiary requirements beyond those set forth in the regulations at 8 C.F.R. § 204.5(h)(3)(iv) and 8 C.F.R. § 204.5(h)(3)(vi).

based on a different, if similarly phrased, classification. It must be noted that many I-140 immigrant petitions are denied after USCIS approves prior nonimmigrant petitions. *See, e.g., Q Data Consulting, Inc. v. INS*, 293 F. Supp. 2d 25 (D.D.C. 2003); *IKEA US v. US Dept. of Justice*, 48 F. Supp. 2d 22 (D.D.C. 1999); *Fedin Brothers Co. Ltd. v. Sava*, 724 F. Supp. 1103 (E.D.N.Y. 1989).

We are not required to approve applications or petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. *See, e.g., Matter of Church Scientology International*, 19 I&N Dec. 593, 597 (Comm'r 1988). It would be absurd to suggest that USCIS or any agency must treat acknowledged errors as binding precedent. *Sussex Engg. Ltd. v. Montgomery*, 825 F.2d 1084, 1090 (6th Cir. 1987), *cert. denied*, 485 U.S. 1008 (1988).

Furthermore, our authority over the service centers is comparable to the relationship between a court of appeals and a district court. Even if a service center director has approved a nonimmigrant petition on behalf of the alien, we would not be bound to follow the contradictory decision of a service center. *Louisiana Philharmonic Orchestra v. INS*, 2000 WL 282785 (E.D. La.), *aff'd*, 248 F.3d 1139 (5th Cir. 2001), *cert. denied*, 122 S.Ct. 51 (2001).

An application or petition that does not comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (noting that the AAO conducts appellate review on a *de novo* basis).

B. Evidentiary Criteria²

Documentation of the alien's receipt of lesser nationally or internationally recognized prizes or awards for excellence in the field of endeavor.

Although the director's decision did not address this criterion, the record does contain evidence of awards the petitioner submitted in response to the director's request for evidence. The plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(i) requires "[d]ocumentation of the alien's receipt" of prizes or awards. USCIS may not utilize substantive or evidentiary requirements beyond those set forth at 8 C.F.R. § 204.5. *See Kazarian*, 596 F.3d at 1221, *citing Love Korean Church v. Chertoff*, 549 F.3d 749, 758 (9th Cir. 2008).

The petitioner relies on a non-precedent AAO decision to assert that awards granted to individuals other than the beneficiary should be considered comparable evidence. An inability to meet a criterion is not necessarily evidence that the criterion does not readily apply to the beneficiary's occupation such that a petitioner may rely on comparable evidence pursuant to 8 C.F.R. § 204.5(h)(4). In addition, the petitioner has not demonstrated that awards in the beneficiary's occupation do not exist.

² The petitioner does not claim to meet or submit evidence relating to the regulatory categories of evidence not discussed in this decision.

While the regulation at 8 C.F.R. § 103.3(c) provides that AAO precedent decisions are binding on all USCIS employees in the administration of the Act, unpublished decisions are not similarly binding. Applications or petitions are not required to be approved where the petitioner has not demonstrated eligibility because of prior approvals that may have been erroneous. *See, e.g., Matter of Church Scientology International*, 19 I&N Dec. 593, 597 (Comm. 1988). USCIS or any agency need not treat acknowledged errors as binding precedent. *Sussex Engg. Ltd. v. Montgomery*, 825 F.2d 1084, 1090 (6th Cir. 1987), *cert. denied*, 485 U.S. 1008 (1988).

The petitioner also asserts that the beneficiary's "Level 2 High Performance Coaching Certificate" is a "[n]ational [a]ward for [e]xcellence," and should be considered under this criterion, as well as the separate criterion regarding membership. 8 C.F.R. § 204.5(h)(3)(ii). Evidence relating to or even meeting the membership criterion is not presumptive evidence that the beneficiary also meets this criterion. To hold otherwise would render meaningless the regulatory requirement that a petitioner demonstrate that the beneficiary meets at least three separate criteria. Therefore, the beneficiary's status as a "Level 2 High Performance Coach" will be considered under the membership criterion below. Regardless, a credential based on passing practical exams is not a prize or award for excellence.

Even if the petitioner were to submit supporting documentary evidence showing that the beneficiary's status as a "Level 2 High Performance Coach" meets the elements of this criterion, which it has not, section 203(b)(1)(A)(i) of the Act requires the submission of extensive evidence. Consistent with that statutory requirement, the plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(i) requires receipt of more than one nationally or internationally recognized prize or award for excellence. Significantly, not all of the criteria at 8 C.F.R. § 204.5(h)(3) are worded in the plural. Specifically, the regulations at 8 C.F.R. §§ 204.5(h)(3)(iv) and (ix) only require a single instance of service as a judge or a single high salary. When a regulatory criterion wishes to include the singular within the plural, it expressly does so as when it states at 8 C.F.R. § 204.5(k)(3)(ii)(B) that evidence of experience must be in the form of "letter(s)." Thus, the plural in the remaining regulatory criteria has meaning. In a different context, federal courts have upheld USCIS' ability to interpret significance from whether the singular or plural is used in a regulation. *Cf. Maramjaya v. USCIS*, Civ. Act. No. 06-2158 (RCL) at *1, *12 (D.C. Cir. March 26, 2008); *Snapnames.com Inc. v. Chertoff*, 2006 WL 3491005, at *1, *10 (D. Or. Nov. 30, 2006) (upholding an interpretation that the regulatory requirement for "a" bachelor's degree or "a" foreign equivalent degree at 8 C.F.R. § 204.5(l)(2) requires a single degree rather than a combination of academic credentials).

In light of the above, the petitioner has not established that the beneficiary meets this criterion.

Documentation of the alien's membership in associations in the field for which classification is sought, which require outstanding achievements of their members, as judged by recognized national or international experts in their disciplines or fields.

As stated by the director in his decision, it is the petitioner's burden to demonstrate that the beneficiary

NON-PRECEDENT DECISION

Page 6

meets every element of a given criterion, including that membership requires outstanding achievements of its members, as judged by recognized national or international experts. Further, the overall prestige of a given association is not determinative; the issue here is membership requirements rather than the association's overall reputation.

On appeal, the petitioner asserts that "[w]hile the requirements to become a coaching member of [REDACTED] require meeting the 'application prerequisites' as you state in your denial letter, a Level 2 certification is an outstanding achievement." According to the by-laws of [REDACTED] "[c]oach members are those individuals who register as active coaches and who are certified as level one (1) through (4) coaches by [REDACTED]". Based upon the information in the record, there are two levels above the beneficiary's level 2 certification. In addition, the by-laws do not state that "outstanding achievements" are a requirement of membership.

On appeal, the petitioner reasserts his initial claim that the beneficiary's position at [REDACTED] a badminton club in [REDACTED] is evidence under this criterion. The petitioner, however, does not provide any documentary evidence that membership in the club requires "outstanding achievements of their members," or provide any explanation as to how a position as a coach is equivalent to membership in an association, as required by the plain language of the regulation.

Although the petitioner initially claimed that the beneficiary satisfied this criterion based on additional coaching positions and sponsorship by [REDACTED] the petitioner fails to specifically address any of these positions and sponsorship on appeal. Thus, the petitioner has abandoned any claim regarding these other accomplishments. See *Sepulveda v. U.S. Att'y Gen.*, 401 F.3d 1226, 1228 n. 2 (11th Cir.2005); *Hristov v. Roark*, No. 09-CV-2731, 2011 WL 4711885 at *9 (E.D. N.Y. Sept. 30, 2011).

In addition, the plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(ii) requires "evidence of the alien's membership in associations" in the plural, which, as previously stated, is consistent with the statutory requirement for extensive evidence. Section 203(b)(1)(A)(i) of the Act.

In light of the above, the petitioner has not established that the beneficiary meets this criterion.

Published material about the alien in professional or major trade publications or other major media, relating to the alien's work in the field for which classification is sought. Such evidence shall include the title, date, and author of the material, and any necessary translation.

Although the director's decision did not address this criterion, the record does contain evidence of evidence submitted in response to the director's request for evidence. The plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(iii) requires "[p]ublished material about the alien in professional or major trade publications or other major media, relating to the alien's work in the field for which classification is sought." In general, in order for published material to meet this criterion, it must be about the petitioner and, as stated in the regulations, be printed in professional or major trade publications or other major media. To qualify as major media, the publication should have significant national or international distribution. Some newspapers, such as the [REDACTED]

NON-PRECEDENT DECISION

Page 7

nominally serve a particular locality but would qualify as major media because of significant national distribution, unlike small local community papers.³

The record does not contain any documentation that any of the submitted evidence for this criterion was published in professional or major trade publications or other major media, as required by the plain language of the regulation. The submission of articles and a television appearance without evidence that they constitute major media is insufficient to establish eligibility for this criterion.

In light of the above, the petitioner has not established that the beneficiary meets this criterion.

Evidence of the alien's participation, either individually or on a panel, as a judge of the work of others in the same or an allied field of specification for which classification is sought.

The director determined that the petitioner established eligibility for this criterion. The plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(iv) requires “[e]vidence of the alien’s participation, either individually or on a panel, as a judge of the work of others in the same or an allied field of specification for which classification is sought.” A review of the record of proceeding, however, does not reflect that the petitioner submitted sufficient documentary evidence establishing that the beneficiary meets the plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(iv) for the reasons outlined below.

Serving as a coach where part of one’s job duties includes evaluating athletes on one’s team does not equate to participation as a judge of the work of others in the field. The phrase “a judge” implies a formal designation in a judging capacity, either on a panel or individually as specified pursuant to the regulation at 8 C.F.R. § 204.5(h)(3)(iv). Informal instances of evaluating athletes as a coach do not meet the elements of this criterion. There is no evidence on record demonstrating that the petitioner actually served “as a judge of the work of others.”

In light of the above, the petitioner has not established that the beneficiary meets this criterion.

Evidence that the alien has performed in a leading or critical role for organizations or establishments that have a distinguished reputation.

The director determined that the petitioner established eligibility for this criterion. A review of the record of proceeding reflects that the petitioner submitted sufficient documentary evidence establishing that the beneficiary meets the plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(viii).

Accordingly, the petitioner meets this criterion.

³ Even with nationally-circulated newspapers, consideration must be given to the placement of the article. For example, an article that appears in the [REDACTED] but in a section that is distributed only in [REDACTED] County, Virginia, for instance, cannot serve to spread an individual’s reputation outside of that county.

NON-PRECEDENT DECISION

Page 8

Evidence that the alien has commanded a high salary or other significantly high remuneration for services, in relation to others in the field

The plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(ix) requires the petitioner to submit evidence of the beneficiary's "high salary or other significantly high remuneration for services, in relation to others in the field." On appeal, the petitioner states that the beneficiary "earned a total of \$45,294.94 in 2010, \$64,775.80 in 2011, and \$64,228 in 2012" and that this included "compensation...for private coaching lessons, which is a common practice by badminton coaches." As the amounts include remuneration other than salary, the submitted documents, including the information regarding the annual salary for a badminton player in [REDACTED] a badminton coach in India, and the determination from [REDACTED] with statistics relating to salary only is not a meaningful comparison. The petitioner must not only submit evidence of remuneration for services, but also submit documentary evidence of the earnings of those in the beneficiary's occupation performing similar work at the top level of the field. In this instance, the record lacks information regarding the total remuneration, rather than the just the salary, for other badminton coaches who perform similar duties. *See Matter of Price*, 20 I&N Dec. 953, 954 (Assoc. Commr. 1994) (considering professional golfer's earnings versus other PGA Tour golfers); *see also Grimson v. INS*, 934 F. Supp. 965, 968 (N.D. Ill. 1996) (considering NHL enforcer's salary versus other NHL enforcers); *Muni v. INS*, 891 F. Supp. 440, 444-45 (N. D. Ill. 1995) (comparing salary of NHL defensive player to salary of other NHL defensemen). Furthermore, as stated by the director, according to the submitted FLC Wage report, the level 4 salary is \$44,510 annually and the beneficiary's salary (not including money earned from private lessons) was \$10,250 in 2010, \$40,567.50 in 2011 and \$29,375 in 2012, which is below the level 4 wage.

Regarding the beneficiary's offered salary of \$48,000, the plain language of the regulation requires that "the alien has commanded a high salary." There is no evidence in the record to demonstrate that the beneficiary had already received the referenced remuneration. Eligibility must be established at the time of filing. 8 C.F.R. §§ 103.2(b)(1), (12); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg'l Comm'r 1971).

Finally, the regulation at 8 C.F.R. § 103.2(b)(2)(i) provides that the non-existence or unavailability of required evidence creates a presumption of ineligibility. According to the same regulation, only where the petitioner demonstrates that primary evidence does not exist or cannot be obtained may the petitioner rely on secondary evidence and only where the petitioner demonstrates that secondary evidence is unavailable may the petitioner rely on affidavits. In the instant petition, the petitioner did not submit any documentary evidence demonstrating that neither primary evidence, nor secondary evidence, such as references to total remuneration, including money earned for private lessons, for top badminton coaches in the media, exists and is available. Furthermore, the letters in the record are not affidavits as they were not sworn to or affirmed by the declarant before an officer authorized to administer oaths or affirmations who has, having confirmed the declarant's identity, administered the requisite oath or affirmation. *See Black's Law Dictionary 58 (9th Ed., West 2009)*. Nor, in lieu of having been signed before an officer authorized to administer oaths or affirmations, do they

NON-PRECEDENT DECISION

Page 9

contain the requisite statement, permitted by Federal law, that the signers, in signing the statements, certify the truth of the statements, under penalty of perjury. 28 U.S.C. § 1746.

Without documentary evidence that the petitioner's total remuneration is high in relation to other top badminton coaches, the beneficiary cannot be found to meet this criterion.

C. Summary

As the petitioner did not submit qualifying evidence on behalf of the beneficiary under at least three criteria, the proper conclusion is that the petitioner has failed to demonstrate that the beneficiary satisfies the antecedent regulatory requirement of three types of evidence.

III. CONCLUSION

Had the petitioner submitted the requisite evidence on behalf of the beneficiary under at least three evidentiary categories, in accordance with the *Kazarian* opinion, the next step would be a final merits determination that considers all of the evidence in the context of whether or not the petitioner has demonstrated: (1) a "level of expertise indicating that the individual is one of that small percentage who have risen to the very top of the[ir] field of endeavor" and (2) "that the alien has sustained national or international acclaim and that his or her achievements have been recognized in the field of expertise." 8 C.F.R. §§ 204.5(h)(2) and (3); *see also Kazarian*, 596 F.3d at 1119-20. While we conclude that the evidence is not indicative of a level of expertise consistent with the small percentage at the very top of the field or sustained national or international acclaim, we need not explain that conclusion in a final merits determination.⁴ Rather, the proper conclusion is that the petitioner failed to demonstrate that the beneficiary has satisfied the antecedent regulatory requirement of three types of evidence. *Id.* at 1122.

The petitioner has not established the beneficiary's eligibility pursuant to section 203(b)(1)(A) of the Act and the petition may not be approved.

The appeal will be dismissed for the above stated reasons, with each considered as an independent and alternate basis for the decision. In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, that burden has not been met.

ORDER: The appeal is dismissed.

⁴ We maintain de novo review of all questions of fact and law. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). 381 F.3d at 145. In any future proceeding, we maintain the jurisdiction to conduct a final merits determination as the office that made the last decision in this matter. 8 C.F.R. § 103.5(a)(1)(ii). *See also* section 103(a)(1) of the Act; section 204(b) of the Act; DHS Delegation Number 0150.1 (effective March 1, 2003); 8 C.F.R. § 2.1 (2003); 8 C.F.R. § 103.1(f)(3)(iii) (2003); *Matter of Aurelio*, 19 I&N Dec. 458, 460 (BIA 1987) (holding that legacy INS, now USCIS, is the sole authority with the jurisdiction to decide visa petitions).